

ORIGINAL

+ 4

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

DOCKET FILE COPY ORIGINAL
RECEIVED

MAY - 7 1997

Federal Communications Commission
Office of Secretary

In the Matter of)
)
Rulemaking to Amend Parts 1, 2,)
21, and 25 of the Commission's)
Rules to Redesignate the 27.5-)
29.5 GHz Frequency Band, to)
Reallocate the 29.5-30.0 GHz)
Frequency Band, to Establish)
Rules and Policies for Local)
Multipoint Distribution)
Service and for Fixed)
Satellite Services)
)
Petitions for Reconsideration)
of the Denial of Applications)
for Waiver of the Commission's)
Common Carrier Point-to-Point)
Microwave Radio Service Rules)
)
Suite 12 Group Petition for)
Pioneer's Preference)

CC Docket No. 92-297

PP-22

To: The Commission

**PETITION FOR RECONSIDERATION OF
THE INDEPENDENT ALLIANCE**

Pursuant to Section 1.106 of the Commission's Rules,¹ the Independent Alliance respectfully submits this Petition for Reconsideration of the Commission's Second Report and Order, Order on Reconsideration, and Fifth Notice of Proposed Rulemaking issued in this docket on March 13, 1997.² The Independent Alliance is a

¹/ 47 C.F.R. § 1.106.

²/ In the Matter of Rulemaking to Amend Parts 1, 2, 21, and 25 of the Commission's Rules to Redesignate the 27.5-29.5 GHz Frequency Band, to Reallocate the 29.5-30.0 GHz Frequency Band, to Establish Rules and Policies for Local Multipoint Distribution

(footnote continues on following page)

No. of Copies rec'd
List ARCADE

OSY

group of rural telephone companies that share a common interest in ensuring that they have the opportunity to deploy LMDS within their existing service areas in a meaningful and useful fashion. The Independent Alliance is an interested party in this proceeding,³ and respectfully petitions for reconsideration of the auction and service rules.

I INTRODUCTION.

The Commission is required, pursuant to Section 309(j) of the Communications Act of 1934, as amended, to provide rural telephone companies with meaningful opportunities to participate in the provision of wireless services.⁴ The LMDS rules adopted by the Commission do not, however, conform with the Commission's obligation to promote opportunities for rural telcos.⁵ To the contrary, these rules contravene directly the Congressional mandate by imposing baseless restrictions on a rural telephone company's

(continued from previous page)

Service and for Fixed Satellite Services, Petitions for Reconsideration of the Denial of Applications for Waiver of the Commission's Common Carrier Point-to-Point Microwave Radio Service Rules Suite 12 Group Petition for Pioneer's Preference: Second Report and Order, Order on Reconsideration, and Fifth Notice of Proposed Rulemaking, CC Docket No. 92-297, PP 22 (rel. Mar. 13, 1997) ("LMDS Second R&O").

^{3/} See Reply Comments of the Independent Alliance, filed Aug. 22, 1996 ("Reply Comments") (in response to In the Matter of Rulemaking to Amend Parts 1, 2, 21, and 25 of the Commission's Rule to Redesignate the 27.5-29.5 Frequency Band, to Reallocate the 29.5-30.0 Frequency Band, to Establish Rules and Policies for Local Multipoint Distribution Service and for Fixed Satellite Services: First Report and Order and Fourth Notice of Proposed Rulemaking, CC Docket 92-297 (rel. Jul. 22, 1996) ("R&O and Fourth NPRM"))).

^{4/} See 47 U.S.C. § 309(j).

^{5/} See 47 U.S.C. § 309(j)(4)(D).

ability to provide LMDS within its existing service area. Accordingly, reconsideration of the rules is necessary to ensure compliance with the Commission's statutory duties to promote opportunities for rural telcos to provide wireless services and to further the goals of universal service.

II THE COMMISSION IS REQUIRED BY SECTION 309(j) TO PROVIDE OPPORTUNITIES FOR RURAL TELEPHONE COMPANIES.

The Omnibus Budget Reconciliation Act of 1993⁶ added a new Section 309(j) to the Communications Act of 1934, as amended. This section directs the Commission to employ competitive bidding procedures to choose from among two or more mutually exclusive accepted applications for initial licenses. The section also requires that the Commission

ensure that small businesses, rural telephone companies, and businesses owned by members of minority groups and women are given the opportunity to participate in the provision of spectrum based services⁷

In recognition of this directive, the Commission declared at the outset of the auctions process that solutions tailored to the needs of each class are appropriate.⁸ In this proceeding, as well

⁶/ Pub. L. 103-66, Title VI, § 6002, 107 Stat. 312, 388.

⁷/ 47 U.S.C. § 309(j)(4)(D).

⁸/ See generally In the Matter of Implementation of Section 309(j) of the Communications Act - Competitive Bidding: Notice of Proposed Rulemaking, PP Docket No. 92-253, 8 FCC Rcd 7635, Section III-C - "Treatment of Designated Entities" (1993). With respect to its treatment of rural telephone companies, the Commission has neither expressly rejected nor explained adequately its deviation from this path. See also In the Matter of Geographic Partitioning and Spectrum Disaggregation by Commercial Mobile Radio Services

(footnote continues on following page)

as others, however,⁹ the Commission has ignored completely its Congressional mandate,¹⁰ having taken no action to promote the opportunity of rural telephone companies, as a class, to participate in the provision of wireless services.¹¹ In fact, the opportunity of rural telephone companies to participate in the LMDS auction is restricted unreasonably by the imposition of an

(continued from previous page)

Licensees; Implementation of Section 257 of the Communications Act - Elimination of Market Entry Barriers: Petition for Reconsideration of the National Telephone Cooperative Association and the Independent Alliance and Reply to Oppositions to Petition for Reconsideration of the National Telephone Cooperative Association and the Independent Alliance, WT Docket No. 96-148, GN Docket No. 96-113 (collectively the "Partitioning Docket Petition for Reconsideration").

^{9/} See In the Matter of Geographic Partitioning and Spectrum Disaggregation by Commercial Mobile Radio Services Licensees; Implementation of Section 257 of the Communications Act - Elimination of Market Entry Barriers: Report and Order and Further Notice of Proposed Rulemaking, WT Docket No. 96-148, GN Docket 96-113 (rel. Dec. 20, 1996). See also Pending Partitioning Petition for Reconsideration.

^{10/} It was not the intent of Congress that opportunities be accorded only to those rural telcos that meet the definition of a "small business." See House Conference Report No. 103-213, at 484 ("The Conferees also agreed to require that the Commission provide economic opportunities for rural telephone companies in addition to small business [sic] and businesses owned by members of minority groups and women.")

^{11/} The Commission's recitation of its commitment to the statutory objective of disseminating licenses among the entities designated by Congress -- small businesses, rural telephone companies, and businesses owned by members of minority groups and women -- is conspicuously barren of any mention of measures designed to encourage the participation of rural telephone companies. See LMDS Second R&O at para. 343.

eligibility standard,¹² in direct contravention of the Congressional mandate.

Not only has the Commission ignored Congressional directives, but it also has attempted to shift the burden of its responsibility onto the very parties it was ordered to assist. Section 309(j) directs the Commission, when formulating licensing rules and procedures, to undertake efforts to ensure the participation of rural telcos in the provision of spectrum-based services. The Commission, however, dodged this responsibility, and has justified the lack of provisions for rural telcos by stating that "[r]ural LECs have not made the case that they are the only entities that can provide LMDS in their service territories."¹³ This statement demonstrates, at best, the Commission's misunderstanding of its obligation and, at worst, a disregard for its responsibility. Congress directed the Commission to promote opportunities for rural telcos. Section 309(j) does not state that rural telcos are required to justify their need for express provisions: the Act provides for those measures as a matter of right. A requirement that rural telcos must meet a burden of proof before provisions are enacted is an invention of the Commission that is antithetic to the directives of statute.

Further, whether the rural telcos are the only entities capable of serving their territories is immaterial. The Commission

^{12/} See newly-adopted 47 C.F.R. § 101.1003(a)-(b) which restricts the eligibility of local exchange companies for the 1150 MHz license block within their service areas for three years. See infra Section III.

^{13/} LMDS Second R&O at para. 179.

is required by the Act to fulfill two distinct obligations: to ensure that rural areas are served,¹⁴ and to ensure the participation of rural telcos in the provision of wireless services.¹⁵ The Petitioners respectfully submit that the Commission's failure to provide specific measures to promote the participation of rural telcos is a failure of the Commission to meet its Congressional mandate. Accordingly, reconsideration of the LMDS rules is appropriate.

III THE RURAL TELEPHONE COMPANY ELIGIBILITY RESTRICTIONS ARE CONTRARY TO EXPRESS CONGRESSIONAL DIRECTIVES.

The Commission suggests that the LMDS eligibility restrictions are consistent with Congressional licensing directives because the restrictions do not constitute a total denial of access to the spectrum by rural telephone companies. This analysis is flawed because it does not address the impact that restrictions will have on a rural telephone company's continuing ability to meet its evolving universal service obligations in an economic and efficient manner.

The Commission speculates that its eligibility restrictions will have a limited effect on rural telephone companies "because [as] rural LECs are generally small, they are unlikely to . . . trigger our eligibility restriction."¹⁶ There is no basis in the record for this conclusion. Under the Commission's "significant

¹⁴/ 47 U.S.C. § 309(j)(3)(A).

¹⁵/ 47 U.S.C. § 309(j)(4)(C), (D).

¹⁶/ LMDS Second R&O at para. 180.

overlap" definition, the absolute size of a telephone company is irrelevant: it is the ratio of the telco's size to the population of the licensing area that determines whether the company is eligible. The smaller the BTA, the more likely it is that even a "small" company will be disqualified because its rural population constitutes a greater percentage of the total population. The Commission's conjecture regarding the impact of its eligibility requirements on rural telephone companies hardly rises to the level of reasoned decision-making.

The Act directs the Commission to promote opportunities for all rural telcos;¹⁷ instead, the Commission's eligibility restrictions inhibit the ability of rural telephone companies to deploy advanced wireless technologies within their service areas. Concentrating on the single objective of promoting competition,¹⁸ the Commission has ignored completely the equally important goal of promoting universal service.

The meaningful opportunity to participate in LMDS in an efficient manner is vital to the preservation and advancement of economic universal service in rural areas. The record in this proceeding contains suggested methods of harmonizing the dual Congressional goals of promoting competition while furthering universal service principles.¹⁹ The Commission addressed neither the goal of universal service nor the suggested alternative

¹⁷/ 47 U.S.C. § 309(j)(D)(4).

¹⁸/ LMDS Second R&O, paras. 157-199.

¹⁹/ See, e.g., Reply Comments at 6-8.

approaches to accommodate both objectives. In failing to consider its dual obligations, the Commission ignored the careful balancing which underlies the Telecommunications Act of 1996 (the "1996 Act"),²⁰ wherein Congress provided clearly that competition is not the only goal to be pursued.

The 1996 Act recognizes the vital participation of rural telephone companies in the provision of telecommunications services to rural America, and encourages and provides for the continued participation of rural telephone companies in this endeavor.²¹ As the Alliance noted in its Reply Comments filed in this proceeding, broadband LMDS technology will provide voice, data, two-way video, teleconferencing, telemedicine, telecommuting, and global networks; its capacity will permit the provision of broadband video-on-demand and distance learning.²² All of these are services contemplated for inclusion in the evolving definition of universal service that is provided by the 1996 Act.²³ As rural telephone companies are, until a state commission designates otherwise, the sole telecommunications carrier eligible within their service areas to receive support for providing universal service,²⁴ rules that prevent rural telephone companies from deploying LMDS are contrary

²⁰/ Pub. L. No. 104-104, 110 Stat. 56 (1996).

²¹/ See, e.g., 47 U.S.C. §§ 214(e)(2), 251(f).

²²/ Reply Comments at 4, citing R&O and Fourth NPRM at para.
15.

²³/ 47 U.S.C. § 254(c)(1).

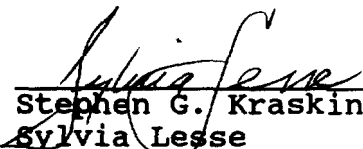
²⁴/ 47 U.S.C. § 214(e)(2).

to established public policy and will impede universal service objectives.

IV CONCLUSION.

The Commission is required by Section 309(j) to promote opportunities for rural telcos. The Commission has not only failed to meet this obligation, but, in adopting eligibility restrictions, has impeded the ability of rural telephone companies to provide economic and efficient universal service to the public. The Commission's action is contrary to law and policy: it is based upon faulty analysis and fails to consider the record in this proceeding. Accordingly, reconsideration of this decision is appropriate.

Respectfully submitted,
The Independent Alliance

By: 
Stephen G. Kraskin
Sylvia Lesse
Joshua Seidemann

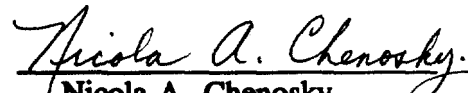
Its Attorneys

Kraskin & Lesse, LLP
2120 L Street, N.W., Suite 520
Washington, D.C. 20037
(202) 296-8890

May 7, 1997

CERTIFICATE OF SERVICE

I, Nicola A. Chenosky, of *Kraskin & Lesse, LLP*, 2120 L Street, NW, Suite 520, Washington, DC 20037, hereby certify that a copy of the foregoing "Petition for Reconsideration of the *Independent Alliance*" was served on this 7th day of May, 1997, by hand delivery to the following parties:


Nicola A. Chenosky

Chairman Reed Hundt
Federal Communications Commission
1919 M Street, NW, Room 814
Washington, DC 20554

Commissioner James H. Quello
Federal Communications Commission
1919 M Street, NW, Room 802
Washington, DC 20554

Commissioner Rachelle Chong
Federal Communications Commission
1919 M Street, NW, Room 844
Washington, DC 20554

Commissioner Susan Ness
Federal Communications Commission
1919 M Street, NW, Room 832
Washington, DC 20554

Regina Keeney, Chief
Common Carrier Bureau
Federal Communications Commission
1919 M Street, NW, Room 500
Washington, DC 20554

International Transcription Services
Federal Communications Commission
1919 M Street, NW, Room 246
Washington, DC 20554